

Vol. 37, No. 44

November 6, 2017

State Adds Guidance on Russian Energy Projects

Again stopping short of implementing sanctions on Russia, State issued additional guidance about entities that made a “significant investment in a special Russian crude oil project.” State previously issued guidance on 40 entities involved in the defense or intelligence sectors, three weeks past a congressionally mandated deadline (see **WTTL**, Oct. 30, page 1).

The guidance posted Oct. 31 includes definitions of “knowingly,” “foreign person” and “significant.” State also noted that “special Russian crude oil project” is a project intended to extract crude oil from: the exclusive economic zone of the Russian Federation in waters more than 500 feet deep; Russian Arctic offshore locations; or shale formations located in Russia.

State issued separate guidance about potential sanctions on energy export pipelines that: “(1) originate in the Russian Federation, and (2) transport hydrocarbons across an international land or maritime border for delivery to another country,” State noted. Pipelines that originate outside Russia and transit through Russian territory would not be the focus of implementation, it added.

The guidance further defined “significant” investments, which State will determine on a case-by-case basis weighing various factors. The factors could include: “U.S. national security and foreign policy interests, in particular where the transaction has a significant adverse impact on such interest; the nature and magnitude of the investment, including the size of the investment relative to the project’s overall capitalization; and the relation and significance of the investment to the Russian energy sector,” State added.

Commerce Adds Fuel to Softwood Lumber Dispute

Much to the chagrin of the Canadian government, Commerce Nov. 2 made its affirmative final determinations in the antidumping and countervailing duty investigations into

© Copyright 2017 Gilston-Kalin Communications LLC.
P.O. Box 5325, Rockville, MD 20848-5325.
All rights reserved. Reproduction, photocopying or
redistribution in any form, including electronic, without
written approval of publisher is prohibited by law.

WTTL is published weekly 50 times a year except last week
in August and December. Subscriptions are \$697 a year.
Additional users pay only \$100 each with full-priced sub-
scription. Site and corporate licenses are also available.
Phone: 301-460-3060 Fax: 301-460-3086

softwood lumber from Canada. A ruling in the long-running dispute was postponed from August (see **WTTL**, Sept. 18, page 7). The department found mandatory respondents Canfor Corporation, Canadian Forest Products Ltd., and Canfor Wood Products Marketing Ltd.; Resolute FP Canada Inc.; Tolko Marketing and Sales Ltd. and Tolko Industries Ltd.; and West Fraser Mills Ltd. were dumping at margins of 8.89%, 3.2%, 7.22% and 5.57% respectively. A final dumping margin of 6.58% applies to all other Canadian softwood lumber producers and exporters.

Commerce found “critical circumstances” with Resolute, Tolko, West Fraser and all others, but not Canfor. Commerce will instruct Customs and Border Protection “to impose provisional measures retroactively on entries of softwood lumber from Canada, effective 90 days prior to publication of the preliminary determination in the Federal Register, for the affected producers and exporters,” according to a Commerce fact sheet.

It further calculated final subsidy rates for Canfor at 13.24%; Resolute at 14.7%; Tolko at 14.85%; and West Fraser at 18.19%, all of which were lower than its preliminary determinations. Voluntary respondent J.D. Irving, Limited received a final subsidy rate of 3.34%. All other producers and exporters in Canada are subject to a 14.25% final subsidy rate.

“While I am disappointed that a negotiated agreement could not be made between domestic and Canadian softwood producers, the United States is committed to free, fair and reciprocal trade with Canada,” Commerce Secretary Wilbur Ross said in a statement.

Sen. Ron Wyden (D-Ore.) repeatedly pushed for resolution in the case. “With today’s action by the Commerce Department, American lumber mills and millworkers are one step closer to getting hard-won relief against subsidized and dumped Canadian softwood lumber. This administration must fully enforce America’s trade laws, not just for the mills and workers in Oregon and across the country, but for the communities that depend on them,” Wyden said in a statement.

In contrast, Canadian officials denounced the margins. “Commerce’s decision on punitive countervailing and anti-dumping duties against Canada’s softwood lumber producers is unfair, unwarranted and deeply troubling. That is why we announced an \$867 million action plan to support affected workers and communities and to chart a stronger future for our workers,” Canadian Foreign Minister Chrystia Freeland and Natural Resources Minister Jim Carr said in a joint statement.

“We urge the U.S. Administration to rescind these duties, which harm workers and communities in Canada. These duties are a tax on American middle class families too, whose homes, renovations and repairs will only be more expensive. Further, it is clear the tariffs are worsening the lumber supply problem in the United States and forcing U.S. home builders to look overseas to meet their demand for lumber,” they added. Canada is prepared to defend its industry through litigation, including through NAFTA provisions and the World Trade Organization (WTO), the ministers noted.

Garrett Gets Grilled at Ex-Im Bank Confirmation Hearing

It was standing room only in the hearing room Nov. 1 when at long last the Senate Banking Committee heard from nominees for the Export-Import Bank (Ex-Im) board and inspector general. The controversial nomination of former Rep. Scott Garrett (R-N.J.) to be the president of a bank he previously tried to shutter drew a crowd of opponents.

Garrett attempted to head off criticism in his opening remarks. “Let me be crystal clear on this point: If I am confirmed, the Export-Import Bank will continue to fully operate, point blank,” he said. But his words are at odds with his past legislative record. As the representative for New Jersey’s fifth district from 2003 until his ouster by Democrat Joshua Gottheimer in the 2016 election, he voted twice against reauthorization and had said the bank “embodies the corruption of the free enterprise system.”

Democrats came down hard on Garrett for his about-face. “It seems to me what’s changed is you’ve been offered this good-paying job to run the Export-Import Bank, not the change of the Export-Import Bank, but perhaps the change of your situation,” said Sen. Sherrod Brown (D-Ohio).

Garrett stuck to his same two talking points – change in administration and change in his role – throughout the nearly two-hour session, to the frustration of many committee members. “You haven’t given us a single principled reason for this change. This bank needs help, I understand that, and it needs change. But it needs a serious leader to do that, and I can’t imagine entrusting this effort to someone who is so obviously willing to blow with the political wind,” said Sen. Elizabeth Warren (D-Mass.).

Garrett’s inability to give a satisfactory answer was not lost on his opponents inside and outside of the hearing room. “[Garrett’s] siren song today is a pathetic attempt to convince senators and manufacturing workers that he is a reformer, not a destroyer,” National Association of Manufacturers President and CEO Jay Timmons said in a statement just after the hearing. Industry groups have opposed Garrett since the moment he was nominated (see **WTTL**, Oct. 2, page 7).

Garrett wasn’t without support. Sen. Richard Shelby (R-Ala.), who as the previous chair of the committee refused to hold hearings for President Obama’s nominees, skewered the bank and entered into the record several conservative publications critical of the bank. Due to Shelby’s previous hold on hearings, the board has not had a quorum since it was temporarily shut down in 2015. Rep. Charles Dent (R-Pa.) has introduced a bill (H.R. 4007) that would revise the Ex-Im board quorum (see **WTTL**, Oct. 23, page 6).

Other Ex-Im nominees Kimberly Reed, Spencer Bachus III, Judith Delzoppo Pryor, Claudia Slacik and Mark Greenblatt garnered few questions and are viewed positively, but the controversy surrounding Garrett may prevent their confirmations. Sen. Pat Toomey (R-Pa.), one of Garrett’s few champions, vowed to stand in the way of a fully functional bank if Garrett is not confirmed. “I think that reforms that protect taxpayers are essential and for that reason I will support these nominees either en bloc or I will support them sequentially, provided that Scott Garrett is confirmed first. And as long

as that is the case, and Scott Garrett is confirmed by the United States Senate, then I will support, as I say, reconstituting the quorum on the Board. If not, then I'll do everything I can to prevent Ex-Im getting a quorum," said Toomey.

Commerce Upholds China's NME Status

Days ahead of President Trump's five-country tour of Asia, Commerce Oct. 26 determined that China is a non-market economy (NME) country "because it does not operate sufficiently on market principles to permit the use of Chinese prices and costs for purposes of the Department's antidumping analysis." China vigorously maintains that per its WTO accession protocols, it be treated as a market economy (see **WTTL**, June 26, page 5).

Commerce announced in April that it would examine China's non-market economy NME status as part of the antidumping investigation of certain aluminum foil from China. Commerce Oct. 27 announced an affirmative determination in that case, resulting in preliminary dumping margins of 96.81% to 162.24%.

"At its core, the framework of China's economy is set by the Chinese government and the Chinese Communist Party (CCP), which exercise control directly and indirectly over the allocation of resources through instruments such as government ownership and control of key economic actors and government directives," the Commerce memo notes.

"The stated fundamental objective of the government and the CCP is to uphold the 'socialist market economy' in which the Chinese government and the CCP direct and channel economic actors to meet the targets of state planning. The Chinese government does not seek economic outcomes that reflect predominantly market forces outside of a larger institutional framework of government and CCP control," it added.

To make its determination, Commerce examined five main factors: "(1) the extent to which the currency of the foreign country is convertible into the currency of other countries; (2) the extent to which wage rates in the foreign country are determined by free bargaining between labor and management; (3) the extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country; (4) the extent of government ownership or control of the means of production; [and] (5) the extent of government control over the allocation of resources and over the price and output decisions of enterprises."

Industry praised the decision. "Commerce's findings comport exactly with everything we know about the Chinese economy from ongoing study by USTR, [Commerce], international financial institutions, published research and just day-to-day observation of what lies behind most major economic decisions made by China," Thomas M. Sneeringer, president of Committee to Support U.S. Trade Laws, said in a statement.

"The evidence could support no other decision," said National Council of Textile Organizations President & CEO Auggie Tantillo in a separate statement. "Properly defining China as a non-market economy simply confirms what every U.S. manufacturer already

understands – China has a set of unfair and extraordinary advantages that allow them to displace investment, production and employment in our market,” he added.

China, as expected, criticized the finding. “Since the reform and opening up, China has established and gradually improved its socialist market economy system, which has been widely recognized by the international society. Regardless of the great achievements of China’s socialist market economy system, the U.S. has continued to view China as a non-market-economy country. This is a gross distortion of reality,” a Chinese Ministry of Commerce spokesperson stated in a statement released Nov. 2. China will “safeguard the legitimate rights and interests of Chinese enterprises and reserve its relevant rights under the WTO dispute settlement system,” the spokesperson noted.

BIS Clarifies Two Popular EAR License Exceptions

With implementation of the export control reform effort well underway, Bureau of Industry and Security (BIS) laid out the welcome mat for exporters whose products have moved to its jurisdiction. In the Federal Register Nov. 1, BIS made revisions to clarify two of the most popular license exceptions in the Export Administration Regulations (EAR) to “provide guidance based on existing agency understanding and practice.”

Specifically, the final rule makes three clarifications to License Exception GOV and adds five notes, along with other minor clarifications, to License Exception Strategic Trade Authorization (STA). “Clarifications in this final rule do not change the EAR requirements for the use of the license exceptions but are intended to assist exporters new to the EAR,” BIS said.

Clarifications to License Exception GOV in the final rule include: the applicability of the term “contractor support personnel,” the meaning of the term ‘temporary,’ and the scope of the term “cooperating governments’ to include civil intergovernmental organizations. Clarifications to License Exception STA include: applicability of transfers (in-country), staying within the scope of the original authorization, multiple consignees on a single prior consignee statement, exclusion for government consignees from prior consignee statement, and exclusion for intangible exports, reexports or transfers (in-country).

Specifically, one new note clarifies that “for ‘600 series’ items authorized under License Exception STA, the items must be provided to an eligible ultimate end user, such as a Country Group A:5 military, to stay in compliance with the original authorization,” BIS wrote. “The new note refers to this concept as ‘completing the chain,’ which means that regardless of how many times the “600 series” item is transferred (in-country) or whether the ‘600 series’ item is incorporated into higher level assemblies or other items or not, the ‘600 series’ item must ultimately be provided to an eligible ultimate end user or be otherwise authorized under the EAR,” it added.

Republican Senators Express Worry About NAFTA's Future

Sens. Ted Cruz (R-Texas) and Pat Roberts (R-Kan.) sounded the pro-trade alarm Oct. 31 at the U.S. Chamber of Commerce, urging both the administration and the audience to expand market opportunities through NAFTA renegotiations. The lawmakers' concern comes just weeks after a contentious negotiating round among the three partners (see *WTTL*, Oct. 23, page 1).

"NAFTA renegotiations can be a good thing or can be a bad thing. And it depends what the objective is of the administration and what the end point is," said Cruz. If the agreement is modernized and expands access for U.S. industry, then it could be "a very good thing." But if barriers are erected via negotiations, then his constituents will suffer. "Now which direction will the administration go? I'll tell you candidly, I don't know," he said.

Voices in the administration are pulling the president in different directions. Cruz said he was "emphatically" urging the administration to expand trade. Senate Republicans are "virtually united when it comes to free trade," but despite this unity, he said it's unlikely there will be trade legislation because of Democratic opposition. "There used to be such a thing as a free trade Democrat. In the United States Senate, much like a brontosaurus, that is a species that is extinct today, you can't find a free trade Democrat anymore," said Cruz. Expect to see much more executive action on trade, he predicted.

Roberts gently ribbed Cruz. "I know Ted said there's no free trade Democrats – I know a few, whether they're going to weigh in on this, I can't tell you." For example, Roberts and Maria Cantwell (D-Wash.) recently introduced a GSP bill together (see Briefs, page 7). Roberts urged the attendees to make the case for expanded free trade that is so critical to agriculture.

"Fact: over the course of the NAFTA agreement U.S. agricultural exports have increased to Canada by 265% and to Mexico by 289%. Mexico barely registered as a market prior to NAFTA, but it is now the top destination for my Kansas wheat farmers," Roberts said. Congressional agriculture committees need help evangelizing the benefits of NAFTA to combat "a pervasive view" that the economy has not benefitted under the trade pact. Roberts has "personally told the president how important free trade is to agriculture, not once, not twice, but on three occasions."

Gordon Stoner, president of the National Wheat Growers Association, painted a dire picture during a panel discussion. "The message we've heard multiple times moving forward the NAFTA trade agreement is 'do no harm.' I propose that we maybe should be saying, 'do no more harm.' We've already seen markets affected by the rhetoric and posturing regarding NAFTA and events outside of NAFTA, building a wall, things like that, that make our neighbors very nervous. NAFTA is absolutely our most important trade agreement. Last year Mexico was the largest destination of U.S. wheat of all our trading partners in the world, about 300 million metric tons," Stoner said.

Rhetoric has already hurt U.S. wheat, Stoner said. Mexico has inked a deal to purchase 30,000 metric tons of wheat from Argentina and is looking to Europe to source wheat. He later criticized Commerce Secretary Wilbur Ross' assessment that agriculture will be fine. Stoner noted that other countries have moved forward with negotiating free trade agreements, while the U.S. hasn't entered into a new deal since KORUS, which itself is in peril (see Briefs, below).

* * * **Briefs** * * *

TRADE FIGURES: Merchandise exports in September jumped 4.7% from year ago to \$130.6 billion, Commerce reported Nov. 3. Services exports gained 4.5% to record-high \$66.2 billion from September 2016. Goods imports increased 6.4% from September 2016 to \$195.9 billion, as services imports gained 4.55% to record-high \$44.3 billion.

CUBA: More things change... In return to tradition, U.S. Nov. 1 voted against annual UN resolution condemning Cuba embargo. Year ago, for first time in 24 years, U.S. and Israel abstained (see **WTTL**, Oct. 31, 2016, page 3). "No doubt there will be some here who do not understand how we can take such opposite positions, separated by just 12 months. They will wonder how we could passively accept this resolution last year and energetically oppose it this year," UN Ambassador Nikki Haley said in remarks, citing presidential election.

COATINGS: Category XIV(f)(7) defense articles, including chemical agent resistant coatings (CARC), are designated as Significant Military Equipment, DDTC reminded exporters in web notice posted Nov. 1. "Accordingly, any application to export Category XIV(f)(7) defense articles requires a DSP-83 non-transfer and use certificate," agency noted.

NOMINATIONS: White House Nov. 2 nominated Christopher Ashley Ford to be assistant secretary of State (international security and non-proliferation). Ford currently serves as special assistant to president and senior director for weapons of mass destruction and counterproliferation at National Security Council. ... At same time, Jeffrey Kessler's nomination to be assistant secretary of Commerce sent to Senate. He is counsel in international trade, investment and market access at Wilmer Cutler Pickering Hale and Dorr LLP. ... Same day, Charles E. Cain named SEC FCPA unit chief. Cain has served as acting chief since April, when former chief Kara Novaco Brockmeyer left post (see **WTTL**, April 10, page 4). He has been deputy chief since 2011.

ASIA: President Trump departed Nov. 3 for Asia tour, with USTR Robert Lighthizer on AirForce One, according to pool reports. He is expected to visit Japan, South Korea, China, Vietnam and Philippines. Trip comes amidst tensions with China regarding its non-market economy status (see related story, page 4) and Korea regarding future of KORUS (see **WTTL**, Oct. 16, page 7). South Korean Trade Minister Kim Hyun-chong requested his government give him authority to terminate trade deal if it harms national interests, South Korean news outlet reported Nov. 2.

GSP: Sens. Maria Cantwell (D-Wash.) and Pat Roberts (R-Kan.) introduced GSP Footwear Act of 2017 (S.2032) in Senate Oct. 30. Under proposal, certain footwear not made domestically would be eligible for GSP for first time. House version of bill (H.R. 2735) introduced in May by Reps. Adrian Smith (R-Neb.) and Earl Blumenauer (D-Ore.). ... Separately, Rep. Ralph Norman (R-S.C.) and Jim Himes (D-Conn.) Oct. 27 spearheaded letter signed by 36 other members of Congress requesting Ways & Means Chairman Kevin Brady (R-Texas) and Ranking Member Richard Neal (D-Mass.) move "as quickly as possible" to renew GSP before it expires Dec. 31.

TRADE NOMINEES: Sen. Chuck Schumer (D-N.Y.) said Oct. 31 that he will hold two Commerce nominees -- Gil Kaplan for under secretary for international trade and Nazakhtar Nikakhtar for assistant secretary for industry and analysis -- over administration's "failure to resolve" steel and aluminum Section 232 investigations. Schumer said imports of steel and aluminum have shot up since investigations announcement, harming domestic industry. "While the administration once preached efforts to crack down on China, it now appears they were just reading us a fairy tale of promises, which actually does not live up to a real crackdown on foreign predatory trade practices," he said. Schumer will hold nominees until Commerce "provides a satisfactory and meaningful response on the progress critical investigations that will help protect our Upstate steel and aluminum companies," he added.

CONFIRMED: Senate confirmed former BIS Under Secretary Kenneth Juster Nov. 2 in voice vote to be ambassador to India. He was nominated in September (see **WTTL**, Sept. 11, page 5).

ITAR: As if WTO fight wasn't enough, Airbus found "certain inaccuracies" in ITAR filings, it announced Oct. 31 in revenue report. "Following a review of its U.S. regulatory compliance procedures, Airbus has discovered and subsequently informed relevant U.S. authorities of its findings concerning certain inaccuracies in filings" made with State pursuant to Part 130 of International Traffic in Arms Regulations (ITAR). "Airbus is cooperating with the U.S. authorities. Airbus is unable to reasonably estimate the time it may take to resolve the matter or the amount or range of potential loss, penalty or other government action, if any, that may be incurred in connection with this matter," company said in release. Section 130 covers political contributions, fees and commissions.

SOLAR: ITC Oct. 31 recommended tariffs and import restrictions on crystalline silicon photovoltaic cells (CSPV) in global safeguard petition (see **WTTL**, Oct. 2, page 7). In one of three opinions from four commissioners, Meredith Broadbent recommended "quantitative restriction on imports of CSPV" cells and modules for four years. Chair Rhonda Schmittlein recommended tariff-rate quota with in-quota rate of 10% ad valorem and in-quota volume level of .5 gigawatts for CSPV cells. For imports exceeding .5 gigawatts, she recommended 30% ad valorem tariff rate. For CSPV modules, Schmittlein recommended 35% ad valorem tariff rate incrementally reduced over four years. David Johanson and Irving Williamson joined in opinion of 30% tariff on imported CSPV modules for four years to decline incrementally. Remedy recommendation goes to White House. Petitioner Suniva wanted 40% tariff per watt on cells and \$.78 minimum price per watt for modules. Solar industry groups, which opposed petition, immediately denounced decision. "Today's vote takes the solar industry one step closer to an unsustainable price point for its most basic inputs," Energy Trade Action Coalition (ETAC) spokesperson Paul Nathanson said in statement.

NORTH KOREA: Treasury, via Financial Crimes Enforcement Network (FinCEN), Nov. 2 prohibited U.S. financial institutions from opening or maintaining accounts for Bank of Dandong, Chinese bank that acts as conduit for illicit North Korean financial activity. FinCEN found Bank to be "financial institution of primary money laundering concern" under Section 311 of PATRIOT Act. At same time, FinCEN issued advisory to "further alert financial institutions to schemes commonly used by North Korea to evade U.S. and United Nations (UN) sanctions, launder funds, and finance the North Korean regime's weapons programs," agency said. Action follows OFAC designation of eight North Korean banks and 26 individuals in September (see **WTTL**, Oct. 2, page 7)... Senate Banking Committee members Nov. 1 reached bipartisan agreement on Otto Warmbier Banking Restrictions Involving North Korea (BRINK) Act of 2017, which would "strengthen and expand U.S. sanctions on North Korea and its financial facilitators and supporters," committee press release noted. Bill, which will replace BRINK Act of 2017 (S. 1591), is scheduled for committee markup Nov. 7.